**This Time it's Different: Legitimacy and the Limits of Differentiation after Brexit**

**ANDREW GLENCROSS**

**Aston University**

**a.glencross@aston.ac.uk**

**THE POLITICAL QUARTERLY (*forthcoming*)**

British political debate since the EU referendum has hinged on what type of Brexit to pursue: hard or soft. Yet, unlike in instances of treaty rejection, the EU made no counter offer to avoid a breakdown in relations that would follow the hardest of exits. This remarkable unity in not discounting the possibility of a hard Brexit demonstrates that UK withdrawal is very distinct from previous wrangles over EU reform. Drawing on the work of Kissinger, this article argues Brexit is a revolutionary act that denies the legitimacy of the EU order. Hence this process does not conform to other episodes of differentiation. When Westminster sought opt-outs, it did not reject the core principles of integration. By not seeking to oppose a hard Brexit, Brussels has forced the UK government to find a new legitimizing principle to govern EU-UK relations, transferring the burden of adjustment to London.

Key words:

Hard Brexit, legitimacy, referendum, Article 50, Kissinger

The outcome of the 2016 UK referendum on leaving the EU instantly led to a heated debate over the legitimacy of the Brexit process itself. Crucial to this legitimacy dilemma is the question of how exactly to disassociate from the EU when no concrete alternative to membership was put to the British electorate. A spectrum of options immediately became apparent, ranging from a hard to a soft exit; the latter scenario relates to retaining membership of the single market and/or the Customs Union; reliance on WTO trading rules in the absence of a free trade agreement with the EU is, conversely, the hardest of exits. What thus took centre stage in British political debate was the issue of whether a hard Brexit was a legitimate reflection of the referendum result.

Looming large over this internal UK wrangling over the best way to alter post-Brexit relations from actual EU membership is the previous history of differentiation among member states, especially that initiated by the UK. The EU has, after all, a track record of providing counter-offers after certain unsuccessful referendums on EU treaties to limit the risk of an insuperable gulf developing between both parties. Differentiation of obligations – notably in the form of treaty opt-outs – indicates the flexibility that has characterized European integration at times of deep division or domestic dissent. Yet no EU concessions were forthcoming following the June 2016 vote, meaning the Article 50 negotiations were conducted not just in the absence of a Cabinet consensus position on what type of Brexit to aim for, but also under the cloud of a potential breakdown of talks.

That is, the European Council, which provides the legal mandate for the Commission’s negotiators, never committed itself to compromise for the purposes of ruling out a hard Brexit as an illegitimate endpoint. In the aftermath of the vote, Brexit was considered from the standpoint of Brussels and national capitals as first and foremost a matter of principle regarding the proper manner of exit, not a dispute over what form of differentiation should define the future EU-UK relationship. European leaders did not follow the cue of domestic opponents of Brexit by decrying a hard separation as illegitimate. Even after the 2017 general election that seemingly weakened the UK government’s ability to opt for maximum differentiation there was no EU attempt to cajole the British public into accepting single market and/or customs union membership.

Negotiations continued instead on the basis of the original instructions that the EU ‘will prepare itself to be able to handle the situation also if the negotiations were to fail’.[[1]](#endnote-1) This united front, which accepts the possibility of a hard Brexit as preferable to a compromise deal that offers too many advantages without corresponding obligations, is remarkable. It flies in the face of Eurosceptic expectations – emboldened by the twin migration and Eurozone crises – that the UK referendum could have a domino effect, acting as a catalyst for rolling back decades of integration.

Consequently, the UK’s departure from the EU must be understood as conceptually very distinct from previous or ongoing wrangles over reform of the EU. Earlier episodes, notably as this paper shows those involving UK attempts to gain special treatment during its time as an EEC/EU member, related to differentiated integration, in the sense of legitimate divergence over the pace and depth of integration. Brexit is different, precisely because it constitutes a fundamental repudiation of EU legitimacy. Following Henry Kissinger, the UK’s withdrawal is defined here as a revolutionary act that denies the legitimacy of a particular international order. This is contrasted with the idea, also found in Kissinger’s account of the nineteenth-century Concert of Europe of negotiating differences over a “just arrangement” within a settled order.[[2]](#endnote-2) Whereas differentiation is a process of negotiating differences within such a settled system, Brexit is based on rejecting the EU consensus over the legitimacy of the founding principles of European integration, especially free movement and legal supremacy.

By reading the Article 50 negotiations as a unilateral move born of a revolutionary mindset, it becomes clear why the Brexit process does not conform to standard models of differentiation. As Kissinger might put it, the talks have struggled to find a new legitimizing principle by which the UK can relate to the EU. British attempts to negotiate a way to decouple comprehensive trade relations from free movement and from jurisdiction of the European Court of Justice have been met by a constant EU reminder that such “cherry picking” is not preferable to a hard Brexit. The latter is thus a perfectly legitimate outcome for the EU, unlike the idea of accommodating UK interests with a form of differentiation that avoids the political downsides of interdependence.

**The Hard/Soft Distinction and its Unimportance to the EU**

Leaving the EU became the all-consuming preoccupation of UK politics as soon as the referendum result was announced. In this context, the hard-soft spectrum of plausible Brexit scenarios became of the utmost significance and quickly established itself as a cleavage issue within the two main parties. However, the notion that there might be different kinds of options for how to leave the EU did not feature prominently in the prelude to the 2016 UK referendum. A twitter hashtag search reveals no use of either #HardBrexit or #SoftBrexit worldwide from the date of the 2010 General election until the day before the referendum on 23 June 2016. The relevant hard/soft distinction prior to the vote was that between hard and soft Eurosceptics, with the latter the implicit target of David Cameron’s renegotiation that concluded with the European Council meeting 18-19 February 2016. Indeed, the decision to hold a referendum was fundamentally shaped by the rise of hard Euroscepticism among Conservative MPs as the Eurosceptic/Europhile cleavage was replaced by the hard/soft Eurosceptic division.

Neither side had an incentive during the pro- and anti-EU debate to focus on the gradations of nuance possible in the event of a vote to end membership. The Remain camp sought to magnify the threats associated with leaving, thereby always presenting Brexit in the most economically damaging light. The Vote Leave campaign, by contrast, could appeal to a large constituency by consciously maintaining ambiguity over future plans for immigration or the economy outside the EU. In this regard, the British Electoral Commission’s designation of Vote Leave as the officially funded representative of the No position was crucial because it marginalized the rival, UKIP-affiliated Grassroots Out movement, which was explicit about ending free movement and thus leaving the single market. Cabinet ministers such as Boris Johnson and Michael Gove, whose defiance of the pro-EU line of Prime Minister David Cameron proved decisive in mobilizing voters, would not otherwise have been so comfortable in leading the Leave campaign.[[3]](#endnote-3)

The soft/hard issue leached into partisan politics during the 2017 UK election. Jeremy Corbyn’s Labour Party advanced a suitably ambiguous “jobs first Brexit” that could appeal to the broadest constituency regardless of the referendum vote. That did not prevent Corbyn – long suspected of opposing EU membership – sacking three shadow cabinet ministers who, after the election, backed an amendment to the Queen’s Speech to preserve membership of the single market and the customs union. The establishment of a cross party parliamentary group on EU relations by Conservative MP Anna Soubry and Labour MP Chuka Umunna equally indicated the extent to which the cleavage over what type of Brexit to pursue had become an intra-party one.

Britain’s obsession with the soft/hard debate over EU withdrawal certainly became an object of political commentary elsewhere in Europe, as illustrated by the fact coverage in French, German, Spanish, or Italian is peppered with the antinomies *dur/mou*, *hart/weich*, *duro/blando*, *dura/morbida* respectively). The different options for how Brexit can be delivered have also been picked up in polling on attitudes to the future UK-EU relationship amongst citizens in the EU27.[[4]](#endnote-4) Yet the official European response to Brexit is defined by an indifference to the soft/hard Brexit distinctionThis can be demonstrated by the absence of the hard/soft dichotomy in the language used by major EU figures when discussing Brexit.

Emmanuel Macron gave 31 speeches and official interviews mentioning Brexit between the date the referendum result was known and the conclusion of the publication of the joint report on phase I of Article 50 talks in December 2017. Never once did he make use of the distinction between two opposing types of Brexit. W when asked at a joint press conference with Theresa May whether the result of the June election augured a “softer Brexit” he avoided using this language in his answer. Michel Barnier, the EU’s designated article 50 negotiator, has also refrained from using this conceptual framework in his speeches and press conferences. Instead of replicating the new cleavages of British politics, the EU forged a quick consensus on the mandate for conducting talks with the UK, specifically forbidding bilateral negotiations with individual member states.

Most significantly, the European Council devised guidelines and procedures that in no way preclude a hard Brexit. Hence there was no hint of potential concessions to avoid this most unwelcome outcome; the emphasis was squarely on the process of Brexit itself rather than on favouring one particular finality over another. During the first phase of Article 50 talks the EU was unwavering in its position that it was up to the UK to choose which type of Brexit was deemed legitimate.

**Legitimacy and the reordering of Europe**

So why in the year of unprecedented uncertainty after the UK referendum did the EU never actively seek to prevent a hard Brexit, especially when the British government’s own mandate for this outcome was increasingly called into question domestically? The answer to this question lies in understanding that Brexit marks a new phase of European (dis)integration in which the problem of legitimacy becomes central. This is because the UK’s departure from the EU necessarily entails a re-consideration of the European order given the importance of the UK to the continent’s economy and security. Hence the challenge posed by the UK referendum is of a type and magnitude comparable to the Congress of Vienna’s task of creating a stable international order for post-Napoleonic Europe. Of course, the allied powers that assembled in Vienna to redraw Europe’s borders and associated spheres of influence were primarily interested in the military equilibrium that could remove threats to peace, whereas recourse to force is unthinkable in the EU-UK relationship. However, intimately nestled within nineteenth-century Europe’s balance of power consideration was the issue, as Kissinger masterfully demonstrated, of the legitimacy of the settlement. It is precisely on this point that parallels with Article 50 talks emerge.

What the Congress needed to achieve, in Kissinger’s reading, was an outcome that gave neither total satisfaction nor total dissatisfaction to any of the major powers (Austria, Great Britain, Prussia, and Russia). Reaching this goal was not a mechanical calculation based on an abstract formula for how to carve up Europe in a manner that could reconcile competing interests. Rather, it was a negotiation centred on accepting a legitimizing principle that allowed each major power to accept the existence of the others and their associated claims. The key to success was finding a consensus over territory, rights, and obligations that was compatible with each of the great power’s historical and cultural understandings of their standing and interests. In Kissinger’s memorable words, the Vienna settlement that lasted the best part of fifty years was ‘a stage in a process by which a nation reconcile[d] its vision of itself with the vision of it by other powers’.[[5]](#endnote-5) The UK referendum of 2016 was nothing if not a debate over the UK’s vision of itself in relation to Europe and the world beyond. Article 50 talks over withdrawal thus immediately became a negotiation over whether there is common ground with the remaining EU27 for accepting what Britain’s vision of itself is deemed to be.

Critics have pointed to the somewhat fuzzy definition of what the legitimizing principle really was in the case of the Vienna settlement. Claiming that an order whose structure is accepted by all major powers is “legitimate” begs the question of why those same powers have come to this conclusion. Where Kissinger’s analysis is much more analytically precise is on the subject of what constituted a break with established principles of legitimacy i.e. a revolutionary creed, which is one that is open-ended and not self-limiting. It is on these terms exactly that a productive comparison with the Article 50 talks can be based.

Kissinger associates the development of a revolutionary intention of upending an existing order with a power that considers the existing international order “oppressive”. This perspective certainly echoes the rhetoric of the Brexit campaign, which at its core consisted of, on the one hand, railing against the free movement of people principle, and, on the other hand, suggested that a more outward-looking Global Britain would emerge once freed from the constraints of EU trade and regulatory policy. Central to the success of the anti-EU message was the notion that major policy and ideological differences could not be settled from within the EU system, as exemplified by the inability of the UK to repatriate powers during the renegotiation.

The referendum result was an explicit disavowal of David Cameron’s prior renegotiation, which was precisely intended to show that the UK could find a just settlement of these differences as a member state. For Kissinger, the ability to find such an arrangement is a fundamental way to demarcate a legitimate order in which all states are somewhat unsatisfied with the outcome from one in which revolutionary claims are made by a particular state that feels particularly oppressed. Most importantly, a “legitimate order limits the possible by the just; a revolutionary order identifies the just with the physically possible”.[[6]](#endnote-6) The prelude to Brexit was in fact punctuated by precisely such revolutionary claims; for instance Conservative MPs attempts to have a British parliamentary veto on single market legislation accepted as part of the renegotiation, as well as Boris Johnson’s advocacy of a “two referendum” scenario in which a first rejection of the EU would serve as a mechanism for subsequently extracting greater concessions.[[7]](#endnote-7)

At every turn in the first phase of negotiations following the referendum, the British government adopted this revolutionary approach of identifying possible solutions to myriad problems of uncoupling from the EU without having to take account of the EU’s consensus-based preferences or its legal principles. This list included the idea of a “frictionless” border in Ireland made possible by advanced technology, mooting reneging on financial liabilities incurred whilst the UK was a member state, or avoiding the jurisdiction of the European Court of Justice even while seeking to participate in certain aspects of the single market. Similarly, even opponents of a hard Brexit put forward suggestions involving further unilateral concessions to the UK, such as Tony Blair’s idea that the UK could be granted an exemption from free movement in order to remain a member state.

In other words, the before and after of Brexit were predicated on calling into question the legitimacy of the EU order, at least from the perspective of British interests that apparently could be much better served under a completely new framework, or even none at all. This approach constitutes a departure from the traditional approach for negotiating differentiated integration, which functioned on the basis of finding what Kissinger would have called a just arrangement via consensus and self-limitation on the goals advocated. The importance of this distinction can be identified by examining the record of the UK’s previous attempts to establish differentiation in its relationship with the EU: the 1974-75 renegotiation, the 1984 budget rebate dispute, and David Cameron’s now-obsolete renegotiation. Negotiating a future UK-EU relationship is fundamentally different from the bargaining over interests that characterized these previous spats. For in these earlier episodes, the British government voluntarily agreed to limit the scope of conflict, thereby avoiding questioning the whole institutional edifice and its legal foundations. Instead, the UK embarked on differentiation by presenting its preferences within the framework of the existing order that accepted both the legitimacy of the institutional order and the need to find an EU consensus to reform it.

**Comparing Brexit to previous UK differentiation**

As an “awkward partner” in Europe, the UK was known for unilaterally challenging the European consensus on what was considered a just arrangement. Successive British governments explicitly sought to recalibrate the advantages and disadvantages of European integration in the UK’s favour beginning with the Labour Party, which won the General Election of February 1974 with a manifesto that included a pledge to renegotiate the terms of EEC membership. As was the case four decades later, this was a unilateral move that first rested on what the scale of the UK’s ambitions would be.[[8]](#endnote-8) The internal dispute within the ruling Labour Party revolved around whether to insist on treaty change i.e. challenging the legitimacy of the existing order settled prior to the UK’s accession. The British cabinet was divided on this issue, in part because Prime Minister Harold Wilson was agnostic about the approach to take. The Foreign Secretary, James Callaghan, whose department led the bilateral discussions sounding out other countries’ views, outmanoeuvred EEC-sceptics such as Tony Benn by settling for policy reform (notably regarding the budget and the Common Agricultural Policy) rather than treaty change. These attenuated renegotiation goals were shaped by the responses of the French and German governments which informed Callaghan of their unwillingness to see any backsliding that would undermine the existing institutional structure and the controversial “own resources” system of financing agreed prior to UK entry. What the Labour government did, therefore, was advocate reforms beneficial to the UK that would in fact become part of the common architecture of the EEC. Here the self-limiting narrative was that the UK never had a chance to put forward such concerns at the earlier stage when the CAP and the budget system were devised.

Most toxic of all pre-Brexit disputes between London and Brussels was the return of the budget question less than five years after the EEC renegotiation once Margaret Thatcher came to power. The clash over reducing the UK’s contributions, which Wilson’s renegotiation failed to achieve, threatened to reach a level in which no move was off limits to achieve the desired outcome. There was a national debate over whether the UK should withhold its budget contributions, a position supported by the anti-EEC Labour opposition. However, it is a mistake to conflate the level of animosity with a willingness to reject the rules of the system out of hand. Thatcher made a number of compromises to persuade counterparts in the European Council that both her demands and methods were limited. As well as rejecting the suggestion of reneging on financial obligations, Thatcher’s government put forward proposals to relaunch the EEC by completing the single market and also found a diplomatic way to accept making progress on the process of establishing a European union. Other countries thus understood that British demands were limited and remained compatible with further integration, economic and political.

David Cameron’s pre-referendum reset of EU-UK relations also conformed to the model of a self-limiting exercise in what to negotiate and what to avoid asking for. His plan was to achieve changes that would align with British preferences and so provide a springboard for a smooth and successful referendum campaign. Opinion polls showed a clear preference among voters to stay in a reformed EU, which was also the sentiment amongst his Cabinet. As in 1975, then, the dilemma for the UK government was how far to push for EU reform as opposed to seeking unilateral guarantees for British interests.

Cameron sought to triangulate between a unilateral settlement favouring the UK and changes in how the EU system in general worked. Before making his keynote speech announcing his plan to hold a referendum, he met with his key advisors to prepare what other EU leaders would understand as a “sincere and credible contribution to the European debate”[[9]](#endnote-9) As Cameron himself later put it in a newspaper article, ‘if there is no appetite for a new treaty for us all then of course Britain should be ready to address the changes we need in a negotiation with our European partners’, while noting that a successful renegotiation ‘will have transformed the European Union and Britain’s relationship with it’.[[10]](#endnote-10) From the outset, his proposals were more measured than those stemming from his Eurosceptic backbenchers, 95 of whom wrote to the Prime Minister in 2013 asking for the introduction of a unilateral parliamentary veto (incompatible with European law) over EU legislation. The other Eurosceptic demands incompatible with the existing legal framework were a quantitative restriction on EU migration alongside repatriation of certain policy competences. Cameron nevertheless forbore from making unilateral demands of the type suggested by the hard Eurosceptics that were increasingly prevalent in his party.

Cameron’s renegotiation in reality did very little to extend the differentiation that already marked out the UK from its peers; there was no revolutionary intention. Instead of rolling back the principle of free movement of EU citizens or EU legal supremacy, the UK government had to be content with technical tweaks of welfare provisions for migrants and some emollient pledges for how the EU would be run in the future. The only UK-specific measure contained in the European Council’s February conclusions was a promise to change the wording of the EU treaties at an unspecified point in the future to make it clear that references to ever closer union do not apply to the UK. There were plans for a new EU law allowing states facing a surge in immigration to restrict access to welfare for recent EU migrants, and another curbing the right to claim child benefit for children living abroad. In addition, EU leaders accepted the principle that if a majority of national parliaments object to a proposed EU law, the Council would refrain from passing it, the so-called “red card” idea. Hence the more substantial features of the agreement proved that the UK approached the renegotiation – as it did with earlier instances of differentiation – with a view to generating consensus without calling into question the uniformity of the single market or subsequent moves towards political union.

**Brexit: Negotiating Disintegration rather than Differentiation**

As shown above, the previous episodes in which the UK contested integration for the purposes of differentiation did not entail rejecting the legitimacy of participating in European integration and its core principles. Equally, non-EU states that participate formally in selected tranches of integration (whether the European Economic Area (EEA) for Iceland or Norway, or those with Association Agreements as a pathway to eventual membership itself) do so on the basis that pooling sovereignty is the best response to interdependence, which is the legitimizing principle of the EU itself. Brexit, by contrast, is a negotiation over changing the status quo that is premised on the possibility of the UK having no formal, institutionalized relationship with the EU. In a mark of how far the UK rejected the legitimacy of the EU system, the British government approached the first phase of the talks over decoupling by questioning shared liabilities accrued over the years as well as the rights of EU nationals in the future.

The Brexit process, therefore, is not an easy glidepath from internal differentiation, as a member state, to an outsider form of differentiation. Internal differentiation is based on accepting the legitimacy of the core EU system by finding an accommodation over the horizontal reach of EU policies. The British government argued throughout the first phase of Article 50 talks that it was not prepared to accept a standard model of outsider differentiation such as the EEA or customs union membership, which are tantamount to a “soft” Brexit. In return, by not seeking to oppose a hard Brexit, the EU shifted the burden of adjustment to the UK. Disintegration in the shape of British withdrawal can only be resolved by finding a new legitimizing principle to govern EU-UK relations, which is the unenviable task of the British government as it seeks to act on a slim referendum majority that did not provide a solution as to the future relationship.

Negotiating disintegration is thus very different from negotiating differentiation, whether as an insider or from the outside, as a non member state. That helps explain why the UK referendum did not create a broader momentum elsewhere in the EU for turning the clock back on integration. Despite certain predictions to the contrary, there was no immediate domino-effect of other governments pledging to hold referendums on leaving. The subsequent process of disintegration nonetheless provides a lesson-learning example for countries inclined to differentiation. The travails of the Brexit negotiations demonstrate that it is perhaps easier to find a just arrangement – based on self-limited goals – from within the EU than it is to reconfigure relations entirely for some potential future gains. Hence the first and possibly only use of Article 50 could persuade Eurosceptic member states that they are better off seeking internal differentiation rather than pinning their hopes on successful disintegration.

1. European Council (Art. 50) guidelines for Brexit negotiations, 29 April 2017. Available at <http://www.consilium.europa.eu/en/press/press-releases/2017/04/29/euco-brexit-guidelines/> Accessed 12 March 2018. [↑](#endnote-ref-1)
2. H. Kissinger, *A World Restored: Metternich, Castlereagh and the Problems of Peace, 1812-1822*, New York: Houghton Mifflin, 1957. [↑](#endnote-ref-2)
3. See H. Clarke, M. Goodwin, and P. Whiteley, *Brexit! Why Britain Voted to Leave the European Union*. Cambridge: Cambridge University Press, 2017. [↑](#endnote-ref-3)
4. S. Walter, ‘Europeans Support the EU’s Hardline in Brexit Negotiations’, LSE Brexit Blog, 23 October 2017. Available at <http://blogs.lse.ac.uk/brexit/2017/10/23/europeans-support-the-eus-hard-line-in-the-brexit-negotiations/> Accessed 12 March 2018. [↑](#endnote-ref-4)
5. H. Kissinger, ‘The Congress of Vienna: A Reappraisal’, *World politics*, vol. *8, no.* 2 1956, pp.264-280, p. 264. [↑](#endnote-ref-5)
6. H. Kissinger, *A World Restored*, p. 172 [↑](#endnote-ref-6)
7. See the account in T. Shipman, *All Out War: The Full Story of How Brexit Sank Britain’s Political Class*, London: William Collins, 2016. [↑](#endnote-ref-7)
8. S. Wall, *Stranger in Europe: Britain and the EU from Thatcher to Blair,* Oxford: Oxford University Press, 2008. [↑](#endnote-ref-8)
9. A, Seldon and P. Snowdon, *Cameron at 10: The Inside Story*, London: William Collins, 2015. [↑](#endnote-ref-9)
10. D. Cameron, The EU is not working and we will change it’, The Daily Telegraph, 15 March, 2014. [↑](#endnote-ref-10)